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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1107

LAWRENCE HOLZMAN,
Trustee in Bankruptcy,
Petitioner,

vs.

ALFRED M. LEWIS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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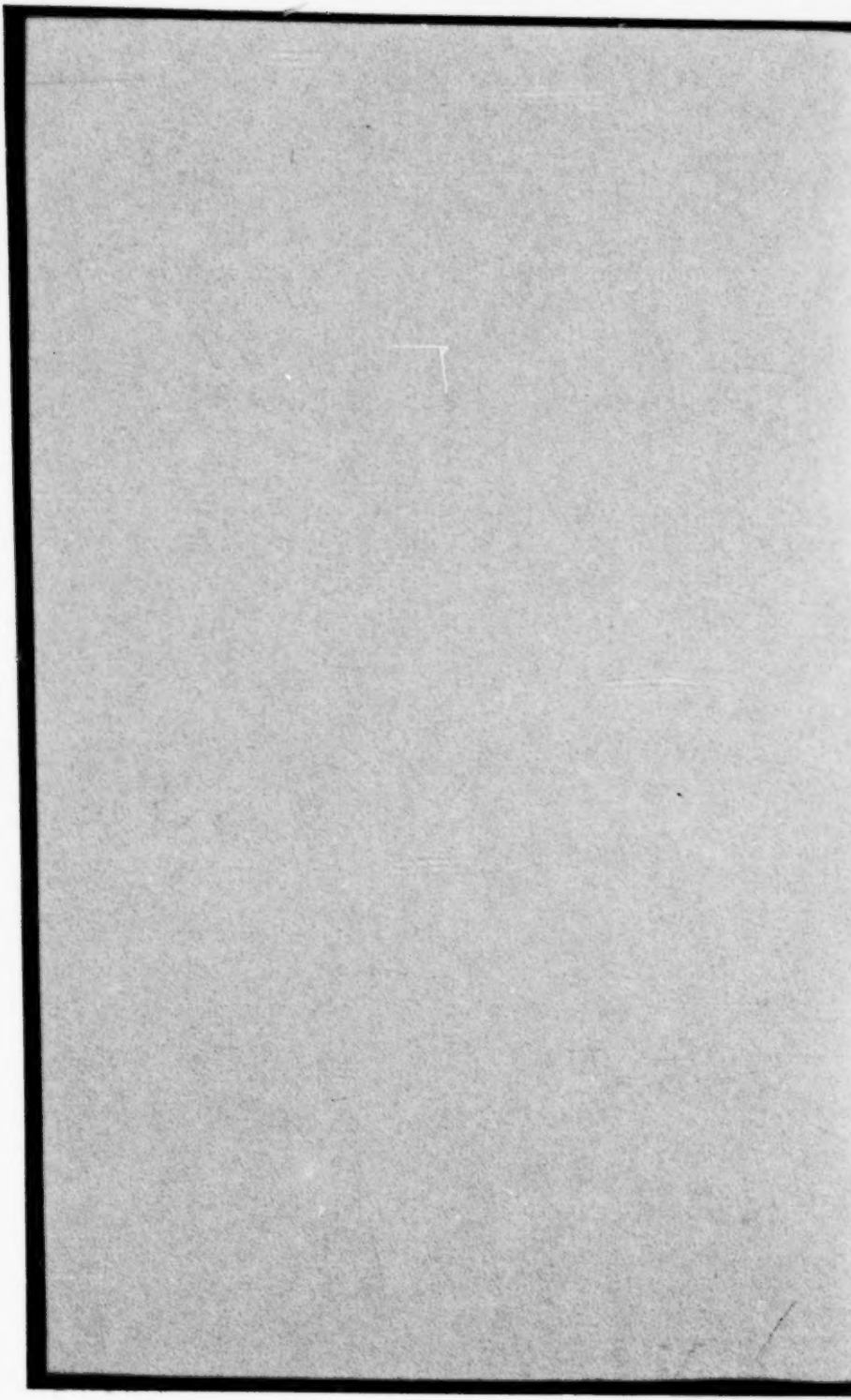

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The Petitioner, Lawrence Holzman, Trustee in Bankruptcy for Telemart Enterprises, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 17, 1975.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix as A hereto. The opinion of the District Court for the Southern District of California appears in the Appendix as B hereto.

Jurisdiction

The Judgment of the Court of Appeals was entered on September 17, 1975. A due and timely Petition for Rehearing was denied on November 6, 1975, and a suggestion for rehearing en banc made with the aforesaid Petition for Rehearing was rejected at the same time. A copy of the Order denying the Petition for Rehearing and rejecting the suggestion for a rehearing en banc appears as C in the annexed Appendix. This Court's jurisdiction is invoked under 11 U.S.C. §47; (§24 (c) of the Bankruptcy Act, as amended.)

Questions Presented

1. Whether or not §2702(2) of the California Commercial Code, the provision on which Respondent relies for its right

to recover, is invalid as against a Trustee in Bankruptcy because it is in conflict with §64 and §67 of the Bankruptcy Act.

Statutory Provisions Involved

The provisions of §2702(2) of the Commercial Code of the State of California are:

> Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten (10) days after the receipt, but if a misrepresentation of solvency has been made to the particular seller in writing within three (3) months before delivery the ten (10) day limitation does not apply. Except as provided in this subdivision the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

The foregoing section is also §2-702 (2) of the Uniform Commercial Code which is in effect in approximately 27 of the other states of the United States.

Statement of the Case

This case involves a Petition for Reclamation by Alfred M. Lewis, Inc. against the Trustee in Bankruptcy for Bankrupt Telemart Enterprises, Inc. The Honorable Louis M. Karp, Referee in Bankruptcy, denied the Petition for Reclamation. Lewis thereafter petitioned the District Court for review of the referee's order. On April 6, 1973, the Honorable Edward J. Schwartz, United States District Judge denied the Petition for Review and affirmed the referee's order and on May 24, 1973, he denied the motion of Lewis to vacate his April 6th order. Lewis filed a timely notice of appeal from these orders.

On September 17, 1975, the United States Court of Appeals for the Ninth Circuit Court filed its opinion reversing the judgment of the District Court and remanding for a new hearing on Lewis'

Petition for Reclamation. Petitioner thereupon filed a Petition for Rehearing and for a Rehearing en banc which petition was denied by an Order of the Court filed on November 6, 1975.

Telemart Enterprises, Inc. is a California corporation incorporated for the purposes of engaging in the business of the sale and delivery of retail merchandise pursuant to telephone orders placed by customers and home delivery of the orders. The store opened for business September 13, 1970, but within three (3) or four (4) days it became apparent that the warehouse system was inadequate and that Telemart Enterprises, Inc. was not going to be able to continue operating without major modification. On September 29, 1970 Telemart Enterprises, Inc. petitioned for a Chapter XI Arrangement and on December 10, 1970, was adjudicated bankrupt.

Between August 27, 1970, and September 25, 1970, Respondent Lewis sold and delivered to Telemart Enterprises, Inc. frozen foods, groceries and other merchandise of an agreed value of $61,587.43,

no part of which has been paid. On September 30, 1970, Respondent Lewis, by a letter delivered to Telemart Enterprises, Inc.'s Receiver demanded return of the merchandise sold to Telemart Enterprises, Inc. After a series of hearings the referee denied the Petition of Reclamation after which the litigation proceeded through the United States District Court and the United States Court of Appeals as hereinabove outlined.

REASONS FOR GRANTING THE WRIT

I

The Circuit Court has upheld as valid in the State of California §2702(2) of the California Commercial Code which is the same as §2-702 (2) of the Uniform Commercial Code. The Circuit Court in its opinion has determined that the cited section of the Uniform Commercial Code does not create a lien which conflicts with §67c(1) (A) of the Bankruptcy Act.

The Circuit Court in its opinion, also finds that while §2-702(2) of the Uniform

Commercial Code does appear to create a preference in distribution which is violative of §64 of the Bankruptcy Act, that it was not the intent of Congress that priorities declared by §64 of the Bankruptcy Act should have any application in the case of assets to which the bankrupt has received a voidable title. The Circuit Court in effect says that sales which come within the provisions of §2-702(2) create only defeasible title in the buyer and that Congress did not intend §64 of the Bankrutcy Act to apply to situations in which the bankrupt had received only a voidable title.

It is respectfully submitted that the opinion of the Circuit Court in effect amends §64 of the Bankruptcy Act by reading into it language which is simply not there i.e. that the priorities declared by this section shall have no application in the case of assets to which the bankrupt has received a voidable title. The Bankruptcy Act does not say this. There is no ambiguous language in the Act which could be interpreted by the Court as evidencing any such intent by Congress. It

is further respectfully submitted that had Congress desired this result it could provide such language and that the Circuit Court, by its decision, is not interpreting legislation, or any ambiguity therein, but is simply adding what it believes should be the law to the existing legislation. This would appear to be an unwarranted and undesirable usurpation of the powers of Congress by the Judiciary.

II

In so far as Petitioner's research has been able to discover there have been only a few recent cases involving the question of whether or not Uniform Commercial Code §2-702(2) is invalid as being in conflict with §64 and §67 of the Bankruptcy Act (In re Good Deal Supermarkets, Inc., 384 F. Supp. 887; In re Federal's, 12 UCC Rep. Serv. 1142 (E.D. Mich. 1973). These cases, which are all at a lower court level than the Circuit Court, have uniformly held that Uniform Commercial Code §2-702 (2) is invalid as being in conflict with the Bankruptcy Act.

Since the Supreme Court constitutionally exercises broad authority over the

whole field of bankruptcy we believe it appropriate that certiorari be granted to settle the critically important commercial and bankruptcy problems not heretofore resolved.

The respective rights and priorities under the Uniform Commercial Code, as between merchandise suppliers attempting to reclaim merchandise and unsecured creditors (or their Trustee in Bankruptcy) have not authoritatively been defined by the Honorable Court, but should be. This case, since it involves issues which are typical and which will be raised in like situations throughout the United States presents an ideal opportunity, we submit, to decide the critically important issues required by the business community in the setting of the relatively newly adopted Commercial Code.

III

Petitioner respectfully submits that the Uniform Commercial Code §2-702(2) attempts to create a statutory lien in that the particular effect of the provision is to give the seller a right to reclaim his particular merchandise in the

event of insolvency. This is effectively an attempt to give a State statutory lien a priority which is in conflict with the Bankruptcy Act.

Even if it be said that this Section does not create a lien there can be no question that it is an attempt by state law to give a priority in allowing reclamation by a seller of goods sold on credit to an insolvent buyer. There can be no argument that such a seller has permitted title to the merchandise to pass to the bankrupt, and that the merchandise has become a part of the insolvent's estate. Giving the seller the right to reclaim the merchandise under these circumstances is obviously giving that seller a priority over all other creditors of such an insolvent buyer so that the seller is therefore receiving a distribution from the bankrupt's estate contrary to the order of priorities required by the Bankruptcy Act. It is respectfully submitted that the seller's right under the Uniform Commercial Code disrupts the federally created order of priorities and to allow the seller to assert his right of

reclamation in a bankruptcy proceeding would be inimical to the very purposes of the Bankruptcy Act.

The result created by the Circuit Court in its opinion in these proceedings ought not be allowed to stand without a review by this Honorable Court.

For the reasons hereinabove set forth we pray the issuance of a writ of certiorari to United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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